Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. ____

In The
Supreme Court of the United States

DONALD C. FLEMING and
WILLIAM ALLEN ARNOLD,
Defendants-Appellants-Petitioners,
PRO SE, NO ATTORNEYS,
ASSERTING A RIGHT OF
SELF-REPRESENTATION

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Respondent

ON RULE 11 PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ORIGINAL RULE 11 JOINT PETITION FOR WRIT OF CERTIORARI

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Questions on Appeal (Discretionary Review)

1. What does *defraud* mean?

2. Does 18 U.S.C. § 371 (defraud) alter that definition?

3. Under the present reorganization, do substantive and procedural due process still exist?

4. Is a Klein conspiracy, by this or any other of its wordings, statutory?

5. Where the executive authority purports to create the "criminal" "statute," is there a violation of separation of powers?

6. Does a non-statutory charge carry any "lesser included's" with it?

7. Does Plaintiff–Appellee–Respondent have standing to complain of matters defined, in whole or in part, by 18 U.S.C. § 371?

8. Can joinder ever occur with a party that lacks standing?

9. When is joinder "final?"

   A. Where there's a plea, and where threshold and apparent joinder of issue follows from mistake of fact, may that mistake be corrected at allocution?

   B. If the signing of the "plea agreement" is the (last) time to "object or waive" regarding joinder, does joinder exist where the "agreement" is (facially) self-breaching?

   C. Where there's a trial, and where threshold and apparent joinder of issue follows from mistake of

fact, may that mistake be corrected as late as allocution, or is joinder irrebuttably resolved at the start of trial?

D. Is disclaimer, arising from asserting the preference for extinguishment as distinct from discharge, a matter of venue or personal jurisdiction, i.e, subject to threshold waiver or estoppel, thus a waste of time to raise thereafter, or of subject matter jurisdiction?

10. Does an indictment that charges criminally the non-payment of FICA or FUTA seek to reinstate "debtor's prison?"

11. Under *Erie* and the proprietorship doctrine, as they pertain to the special maritime and territorial jurisdiction,

    A. does federal public trust policy preempt state public trust policy, for purposes of any of 28 U.S.C. § 3002(15)(a), (b) or (c), outside an area that qualifies under 40 U.S.C. §§ 255, 3111 or 3112?

    B. if part A is answered in the negative, even where the forum is proper, and even where the benefits exist from both public trusts, and even where something substantial moves in commerce so as to satisfy 18 U.S.C. § 8, doesn't the choice of law analysis still favor the state public trust policy, *especially* for an indictment?

    C. even if that state's public policy doesn't apply, doesn't a "taxpayer" have access to the State's original statutory law and common law via 28 U.S.C. § 1333(1) (saving to suitors)?

12. Under Federal Rule of Criminal Procedure 11 ("Rule 11"), is a plea properly set aside where the "plea agreement" is (facially) self-breaching?

13. Under Rule 32(e), is a plea properly set aside where the "plea agreement"

    A. charges usurious interest?

    B. seeks to reinstate "debtor's prison?"

    C. charges *defrauding* but establishes not one penny's worth of property "wrongfully *acquired*?"

    D. seeks to impose sentence upon (*multiple*) allegedly *dismissed* counts?

    E. if there is a lesser included offense in Count One, at all,

        1. confirms, by its own terms, the wholesale and perpetual onslaught of fiduciary abuse?

        2. asserts a claim sounding in trust, but fails even to allege, much less prove, any beneficiary?

        3. attributes to an individual "gross income" that is not any individual's, but rather is that of an unindicted entity?

        4. holds as liable an alleged "responsible party" where no threshold liability in any entity is even alleged, much less proved?

        5. fails to establish any "tax deficiency" in any individual?

6. fails to establish any set of convictions to satisfy the term "corruptly?"

7. asserts and confirms a position so inconsistent with the presumed role as to amount to disclaimer?

F. arises from the same mistake of fact resulting from ignorance of the law that applies to the case, generally?

14. Can the advisory panel's opinion be sustained where there is no evidence of

A. defrauding (wrongful *acquisition*)?

B. "tax deficiency"
1. in any business entity?
2. in any individual?

15. Can the advisory panel's opinion be sustained where the definition of *defraud* in the charge is not the proper definition?

16. Does the "judgment" that orders no restitution confess, judicially, the complete absence of any *defrauding*?

17. Where there is no § 7201 (*payment*) case (for there is no assessment), is there any authority for any payment mandamus?

18. Where there is a "plea agreement," can a "judgment" stand, where the Counts that form the basis for the "judgment" are the very same as those agreed to be dismissed?

19. Where there is a trial, can a "judgment" stand, where the Counts that form the basis for the "judgment"

were dismissed and never tried?

20. Can a "judgment" stand, where the indictment charges the party as a conspirator but he is sentenced as a principal?

21. Can either one of two related "judgments" stand, where, between them, they charge "double taxation?"

22. Can either one of two related "judgments" stand, where, between them, they create "simultaneous double jeopardy?"

Parties

Service is made on the Solicitor General, with whom it shall be a privilege to work through this matter, per Rule 29.4, as the authorized agent in relation to this forum for all of the following interested or potentially interested parties:

United States Court of Appeals for the Eleventh Circuit, generally
(Re: Case Nos. [Fleming–same case] 03-12283-D, 03-12283-DD,* 03-12283,** [Arnold–same case] 03-12810-D, 03-12810-DD,* 03-12810**)
56 Forsyth Street, N.W.
Atlanta, Georgia 30303
Thomas K. Kahn, Clerk

United States District Court for the Middle District of Florida, generally
(Re: Docket Nos. 3:00-cr-262-J-20HTS, 3:00-cr-262-J-20A)
300 North Hogan Street, Suite 9-150
Jacksonville, Florida 32202
Sheryl L. Loesch, Clerk

United States (UNITED STATES)

United States of America (UNITED STATES OF AMERICA)

Government of the United States (GOVERNMENT OF THE UNITED STATES)

United States Government (UNITED STATES GOVERNMENT)

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* A result of inadvertent non-territorial recognition

** A result of "overruling" the reservation of defenses that followed from the first modification. (The courts and clerks have shown great patience.)

Federal Government (FEDERAL GOVERNMENT)

government of the District of Columbia (GOVERNMENT OF THE DISTRICT OF COLUMBIA)

Additional parties.
On appeal from this same indictment:

Joseph Evans (presently, the same case on appeal as Arnold)
Michael Bloomquist (separate trial, separate case on appeal)

Subject to same matter, but separated from the indictment and not on appeal:

Joyce Fleming (a recent mild heart attack patient)

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Appendix A (Fleming) (very same Appendix A as with the Writ of Mandamus)

Appendix B (Arnold) (very same Appendix B as with the Writ of Mandamus)

(References to 1 App., 2 App., 3 App. and 4 App. are references to the Appendices filed in the 11th Circuit.)

Citations to decisions below: None

Jurisdiction

(i) Order regarding Fleming, dated 15 December A.D. 2003;
Failure of "good behavior" release regarding Arnold, as of approximately 15 February A.D. 2004.

(ii) No Order on rehearing applicable

(iii) NA

(iv) 28 U.S.C. § 1254(1); 28 U.S.C. § 2101(c); per Rule 11, 28 U.S.C. § 2101(e); appellate court jurisdiction via 28 U.S.C. §§ 1291, 1294(1) and 18 U.S.C. § 3742.

(v) No "constitutional" questions.

Statutory Provisions Relevant to Certiorari

Title 18

Section 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 371 (2000).

Federal Rules of Criminal Procedure

Rule 11. Pleas

(a) Alternatives.

(1) *In general.* A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) *Conditional pleas.* With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of

any specified pretrial motion. A defendant who prevails on appeal he shall be allowed to withdraw the plea.

(b) Nolo contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right

against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring that the plea is voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

(e) Plea agreement procedure.

(1) *In general.* The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) *Notice of such agreement.* If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) *Acceptance of a plea agreement.* If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) *Rejection of a plea agreement.* If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity

to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) *Time of plea agreement procedure.* Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) *Inadmissibility of pleas, plea discussions, and related statements.* Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath,

on the record, and in the presence of counsel.

(f) Determining accuracy of plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

FED. R. CRIM. P. 11.

Rule 32. Sentence and Judgment

(a) In general; time for sentencing. When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either shortened or lengthened for good cause.

(b) Presentence investigation and report.

(1) *When made.* The probation officer must make a presentence investigation and submit a report to the court before the sentence is imposed, unless:

(A) the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553; and

(B) the court explains this finding on the record.

Notwithstanding the preceding sentence, a presentence investigation and report, or other report containing information sufficient for the court to enter an order of restitution, as the court may direct, shall be required in any case in which restitution is required to be ordered.

(2) *Presence of counsel.* On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.

(3) *Nondisclosure.* The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.

(4) *Contents of the presentence report.* The presentence report must contain—

(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to

the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. § 994(a)(1); and the probation officer's explanation of any factors that may suggest a different sentence—within or without the applicable guideline—that would be more appropriate, given all the circumstances;

(C) a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. § 994(a)(2);

(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(E) in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant;

(F) in appropriate cases, information sufficient for the court to enter an order of restitution;

(G) any report and recommendation resulting from a study ordered by the court under 18 U.S.C. § 3552(b); and

(H) any other information required by the court.

(5) *Exclusions.* The presentence report must exclude:

(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;

(B) sources of information obtained upon a promise of confidentiality; or

(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

(6) Disclosure and objections.

(A) Not less than 35 days before the sentencing hearing—unless the defendant waives this minimum period—the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct that the probation officer not disclose the probation officer's recommendation, if any, on the sentence.

(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer must submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same

time, the probation officer must furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government.

(D) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

(c) Sentence.

(1) *Sentencing hearing.* At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

(2) *Production of statements at sentencing hearing.* Rule 26.2(a)-(d) and (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.

(3) *Imposition of sentence.* Before imposing sentence, the court must:

(A) verify that the defendant and defendant's counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court—in lieu of making that information available—must summarize it in writing, if the information will be relied on in determining sentence. The court must also give the defendant and the defendant's counsel a reasonable opportunity to comment on that information;

(B) afford defendant's counsel an opportunity to speak on behalf of the defendant;

(C) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence;

(D) afford the attorney for the Government an opportunity equivalent to that of the defendant's counsel to speak to the court; and

(E) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.

(4) *In camera proceedings.* The court's summary of information under subdivision (c)(3)(A) may be in camera. Upon joint motion by the defendant and by the attorney for the Government, the court may hear

in camera the statements—made under subdivision (c)(3)(B), (C), (D), and (E)—by the defendant, the defendant's counsel, the victim, or the attorney for the Government.

(5) *Notification of right to appeal.* After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant.

(d) Judgment.

(1) *In general.* A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

(2) *Criminal forfeiture.* When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper.

(e) Plea withdrawal. If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

(f) Definitions. For purposes of this rule—

(1) "victim" means any individual against whom an offense has been committed for which a sentence is to be imposed, but the right of allocution under subdivision (c)(3)(E) may be exercised instead by—

(A) a parent or legal guardian if the victim is below the age of eighteen years or incompetent; or

(B) one or more family members or relatives designated by the court if the victim is deceased or incapacitated;

if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and

(2) "crime of violence or sexual abuse" means a crime that involved the use or attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code [18 USCS §§2241 et seq.].

FED. R. CRIM. P. 32

Section 13. Laws of States adopted for areas within Federal jurisdiction

(a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Common-wealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted

within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(b)(1) Subject to paragraph (2) and for purposes of subsection (a) of this section, that which may or shall be imposed through judicial or administrative action under the law of a State, territory, possession, or district, for a conviction for operating a motor vehicle under the influence of a drug or alcohol, shall be considered to be a punishment provided by that law. Any limitation on the right or privilege to operate a motor vehicle imposed under this subsection shall apply only to the special maritime and territorial jurisdiction of the United States.

(2)(A) In addition to any term of imprisonment provided for operating a motor vehicle under the influence of a drug or alcohol imposed under the law of a State, territory, possession, or district, the punishment for such an offense under this section shall include an additional term of imprisonment of not more than 1 year, or if serious bodily injury of a minor is caused, not more than 5 years, or if death of a minor is caused, not more than 10 years, and an additional fine under this title, or both, if—

(i) a minor (other than the offender) was present in the motor vehicle when the offense was committed; and

(ii) the law of the State, territory, possession, or district in which the offense occurred does not provide an additional term of imprisonment under the circumstances described in clause (i).

(B) For the purposes of subparagraph (A), the term "minor" means a person less than 18 years of age.

(c) Whenever any waters of the territorial sea of the United States lie outside the territory of any State, Commonwealth, territory, possession, or district, such waters (including the airspace above and the seabed and subsoil below, and artificial islands and fixed structures erected thereon) shall be deemed, for purposes of subsection (a), to lie within the area of the State, Commonwealth, territory, possession, or district that it would lie within if the boundaries of such State, Commonwealth, territory, possession, or district were extended seaward to the outer limit of the territorial sea of the United States.

18 U.S.C.S. § 13 (Supp. 2003).

§ 3563. Conditions of probation

(a) Mandatory conditions. The court shall provide, as an explicit condition of a sentence of probation—

(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another Federal, State, or local crime during the term of probation;

(2) for a felony, that the defendant also abide by at least one condition set forth in subsection (b)(2), (b)(3), or (b)(13), unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the other conditions set forth under subsection (b);

(3) for a felony, a misdemeanor, or an infraction, that the defendant not unlawfully possess a controlled

substance;

(4) for a domestic violence crime as defined in section 3561(b) by a defendant convicted of such an offense for the first time that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant;

(5) for a felony, a misdemeanor, or an infraction, that the defendant refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable sentencing information indicates a low risk of future substance abuse by the defendant;

(6) that the defendant—

(A) make restitution in accordance with sections 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and

(B) pay the assessment imposed in accordance with section 3013;

(7) that the defendant will notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments;

(8) for a person described in section 4042(c)(4), that the person report the address where the person will reside and any subsequent change of residence to the probation officer responsible for supervision, and that the person register in any State where the person resides, is employed, carries on a vocation, or is a student (as such terms are defined under section 170101(a)(3) of the Violent Crime Control and Law Enforcement Act of 1994 [42 USCS § 14071(a)(3)]); and

(9) that the defendant cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 [42 USCS § 14135a].

If the court has imposed and ordered execution of a fine and placed the defendant on probation, payment of the fine or adherence to the court-established installment schedule shall be a condition of the probation.

18 U.S.C.S. § 3563(a) (2001).

§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim"

means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or

(iii) an offense described in section 1365 (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

18 U.S.C.S. § 3663A (2001).

Internal Revenue Code

Section 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

IRC § 7201.

Section 7212(a). Attempts to interfere with administration of internal revenue laws

(a) Corrupt or forcible interference

Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

IRC § 7212(a) (Source–16 Aug 1954, ch. 736, 68A Stat. 855). *Cf. Klein*, 247 F.2d at 910-11 (superceding indictment 17 Sep 1954).

Title 28

§ 3002. Definitions

As used in this chapter:

(1) "Counsel for the United States" means—

(A) a United States attorney, an assistant United States attorney designated to act on behalf of the United States attorney, or an attorney with the United States Department of Justice or with a Federal agency who has litigation authority; and

(B) any private attorney authorized by contract made in accordance with section 3718 of title 31 to conduct litigation for collection of debts on behalf of the United States.

(2) "Court" means any court created by the Congress of the United States, excluding the United States Tax Court.

(3) "Debt" means—

(A) an amount that is owing to the United States on account of a direct loan, or loan insured or guaranteed, by the United States; or

(B) an amount that is owing to the United States on account of a fee, duty, lease, rent, service, sale of real or personal property, overpayment, fine, assessment, penalty, restitution, damages, interest, tax, bail bond

forfeiture, reimbursement, recovery of a cost incurred by the United States, or other source of indebtedness to the United States, but that is not owing under the terms of a contract originally entered into by only persons other than the United States; and includes any amount owing to the United States for the benefit of an Indian tribe or individual Indian, but excludes any amount to which the United States is entitled under section 3011(a).

(4) "Debtor" means a person who is liable for a debt or against whom there is a claim for a debt.

(5) "Disposable earnings" means that part of earnings remaining after all deductions required by law have been withheld.

(6) "Earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(7) "Garnishee" means a person (other than the debtor) who has, or is reasonably thought to have, possession, custody, or control of any property in which the debtor has a substantial nonexempt interest, including any obligation due the debtor or to become due the debtor, and against whom a garnishment under section 3104 or 3205 is issued by a court.

(8) "Judgment" means a judgment, order, or decree entered in favor of the United States in a court and arising from a civil or criminal proceeding regarding a debt.

(9) "Nonexempt disposable earnings" means 25 percent of disposable earnings, subject to section 303 of the Consumer Credit Protection Act.

(10) "Person" includes a natural person (including an individual Indian), a corporation, a partnership, an unincorporated association, a trust, or an estate, or any other public or private entity, including a State or local government or. an Indian tribe.

(11) "Prejudgment remedy" means the remedy of attachment, receivership, garnishment, or sequestration authorized by this chapter to be granted before judgment on the merits of a claim for a debt.

(12) "Property" includes any present or future interest, whether legal or equitable, in real, personal (including choses in action), or mixed property, tangible or intangible, vested or contingent, wherever located and however held (including community property and property held in trust (including spendthrift and pension trusts)), but excludes—

(A) property held in trust by the United States for the benefit of an Indian tribe or individual Indian; and

(B) Indian lands subject to restrictions against alienation imposed by the United States.

(13) "Security agreement" means an agreement that creates or provides for a lien.

(14) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, or any territory or possession of the United States.

(15) "United States" means—

(A) a Federal corporation;

(B) an agency, department, commission, board, or other entity of the United States; or

(C) an instrumentality of the United States.

(16) "United States marshal" means a United States marshal, a deputy marshal, or an official of the United States Marshals Service designated under section 564.

28 U.S.C. § 3002 (2000).

Title 31

Section 321. General authority of the Secretary

(d)(1) The Secretary of the Treasury may accept, hold, administer, and use gifts and bequests of property, both real and personal, for the purpose of aiding or facilitating the work of the Department of the Treasury. Gifts and bequests of money and the proceeds from sales of other property received as gifts or bequests shall be deposited in the Treasury in a separate fund and shall be disbursed on order of the Secretary of the Treasury. Property accepted under this paragraph, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gift or bequest.

(2) For purposes of the Federal income, estate, and gift taxes, property accepted under paragraph (1) shall be considered as a gift or bequest to or for the use of the United States.

Section 5101. Decimal system

United States money is expressed in dollars, dimes tenths, cents or [hundredths], and mills or thousandths. A dime is a tenth of a dollar[;] a cent is a hundredth of a dollar, and a mill is a thousandth of a dollar.

31 U.S.C. § 321(d); 31 U.S.C.S. § 5101 (1996).

Statement of the Case

See also "Statement of the Case" from their joint petition for mandamus.

Even Klein didn't commit a Klein conspiracy!

There's a huge difference between "larceny by trick" (wrongful *acquisition*) and "embezzlement" (wrongful *detinue*, wrongful *continued* possession). It is inconceivable how an "income tax" fact pattern, which sounds in "embezzlement," is even remotely cognizable under a "larceny by trick" (defrauding) legal theory. And, where there is no *defrauding*, there can be no conspiracy to *defraud*.

There is no statutory definition of a Klein conspiracy, which is not even a "common law" crime, much less a "federal common law" crime. If the Klein conspiracy language is "authority," then the "experiment in democracy" in this state became a dictatorship 50 years ago when the executive started defining crimes.

No facts support either Fleming's "plea agreement" or Arnold's advisory panel opinion. The prosecution's definition for *defraud* is facially flawed.

"Sentencing" is a ramshackle spectacle! Both were charged as conspirators but sentenced as principals. Further, there being no pleading or evidence of *defrauding*, "sentencing" is based on DISMISSED counts, non-existent charges, charges created during sentencing, fabricated and incompetent numerics, mere "debt" (i.e., "debtor's prison"), "double taxation," and simultaneous double jeopardy.

Fleming's complete loss of meaningful access to the appellate court jeopardizes both his appeal and Arnold's, for the cases are inextricably intertwined.

Wrong legal theory, wrong parties, no statute, no facts, illegal sentencing.

Writ of Certiorari

Remedies Requested.

TAKING JURISDICTION. Petitioners request, per Rule 11, that this Court take jurisdiction prior to a final ruling in the appellate court.

RELEASE PENDING APPEAL. As also addressed in the mandamus proceeding, Petitioners request release pending conclusion of the appellate (and any subsequent review) process.

REVERSAL OF JUDGMENT. Ultimately, Petitioners request reversal of the "judgments" against them.

Overview.

TAKING JURISDICTION. Fleming has been completely denied substantive and procedural Due Process on his direct appeal. As addressed in the related mandamus proceeding, Fleming's appointed counsel's prejudice-causing deficiencies have, so far, been "covered" by Fleming's self-initiative. But, the appellate court's denial of counsel's *second* motion to withdraw, is, to Fleming, a "final judgment." Counsel has abandoned Fleming and has *refused* to assert Fleming's defenses, objections and positions, leaving Fleming no meaningful access. To preserve his direct appeal, Fleming has no alternative remaining but to present it here, *pro se*.

Since Fleming's "plea agreement" and Arnold's trial stem from the same Count in the same indictment, and since, additionally, the "double taxation" and simultaneous double jeopardy issues directly involve and affect Fleming and Arnold, the matters are properly joined for review.

RELEASE PENDING APPEAL. Neither party should have been deprived liberty on this case from the outset. For Arnold, tricky here are the habeas corpus issues. While mandamus certainly applies, if habeas is the preferred remedy, that's fine, but here's the problem. Habeas has "no repetition" rules, and if Arnold is compelled to initiate

habeas now, for "good behavior"-based early release (he should have been released on or about 15 February A.D. 2004), prior to completion of direct appeal, then does he risk getting snared by the "no repetition" rules?

REVERSAL OF JUDGMENT. There is no such thing as a Klein conspiracy. There are no "lesser included's," whether *defrauding*, "tax deficiency" or "obstructing," by law or even by fact, individually or in conspiracy. No basis exists for loss of liberty.

Discussion.

1. What does *defraud* mean?

See joint petition for mandamus, pp. 18-19; Arnold's Brief, Points 1, 2, 4 and 7 (Fleming's Brief, Points 1, 2 and 4).

What it doesn't mean. Whatever may be the definition of *defraud*, it is rooted in the common law, meaning that the canon applies. *Neder*, 527 U.S. at 21-25; *Carter*, 530 U.S. at 264-67; *Morissette*, 342 U.S. at 250-63, in particular 260-63. Since "embezzlement" is a statutory offense, 3 WHARTON § 383 at 463-65, it follows that *defraud*, in § 371,[1] does not, and cannot possibly, mean, include or refer to "embezzlement." The "embezzlement" provision is IRC § 7201.

What it does mean. *Defraud*, as defined by its elements, is this:

(1) *acquisition*
(2) of property (rights)
(3) known by the accused to be property not owned by the accused
(4) by trick or deceit,

the proving of which actus reus typically supplies

(5) the intent to so *acquire* the property wrongfully.

See Bell, 462 U.S. at 358-60 (larceny definitions); *Haas*

[1] Arnold contrasts *defraud* in various contexts, including student loans, mail and securities. Arnold's Brief, pp. 9-19.

(exclusive use information); *Morissette* (mens rea, personal property); *Hyde*, 225 U.S. at 350-54 (land); *Dennis*, 384 U.S. at 860-62 (use of NLRB facility under false pretenses).

Jury Instruction. *See* Arnold's Brief, pp. 14-18, 42. *See* Question 15, *infra*. "To 'defraud' the United States means to interfere with or obstruct one of its lawful government functions by deceit, craft or trickery." (4 App. Instructions 7).

2. Does 18 U.S.C. § 371 (defraud) alter that definition?

What § 371 (defraud) does, and *all* that § 371 (defraud) does, is *narrow* element (2), as follows:

(2) of property (rights) *of the United States or an agency thereof.*

Section 371 does *not* turn "larceny by trick" into "embezzlement." It limits "larceny by trick" to property *of the United States or an agency thereof.*

3. Under the present reorganization, do substantive and procedural due process still exist?

This issue will be answered *de facto* by the ruling. If the territorial conduct, *see* 28 U.S.C. § 3002(15), is authorized to sink so low, even below insolvency, such that agreements for loss of liberty may be proposed and agreed to in this state "on the fly," decency suggests delivering that terminal diagnosis "up front."

If there is no "on the fly" basis for incarceration, then there's a blatant violation of substantive due process, for there is no statute, thus no notice, no "fair warning." "The . . . principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. [*Bouie*, 378 U.S. at 351 (quoting *Harriss*, 347 U.S. at 617.)]" *Lanier*, 520 U.S. at 265 and n.5.

4. Is a Klein conspiracy, by this or any other of its wordings, statutory?

See Arnold's Brief, Point 4 (Fleming's Brief Point 4), and Arnold's motions for release pending appeal. *See also* the joint petition for mandamus.

The only way to arrive at any of the various Klein conspiracy versions is to reproduce what happened in 1954, i.e., combine § 371 (defraud) with § 7201 (both valuation and *payment*) and § 7212 (omnibus) (added, 16 Aug 1954; superceding indictment, 17 Sep 1954) to concoct the "charge." The Klein conspiracy looks to no statute in the entire Code of Laws of the United States. Here's the version used in Count One (2 App. Indictment 2 (¶ A)), identified by its hodgepodge components:

> to defraud the United States Department of the Treasury and the Internal Revenue Service (IRS) [§ 371 (defrauding)] ... for the purpose of impeding [§ 7212], impairing [*Haas*], defeating [§ 7201; *Haas*], and otherwise obstructing [§ 7212; *Haas*] the lawful functions of the IRS [§ 7212; *Haas*] in the ascertainment [§ 7201 (valuation)], computation [§ 7201 (valuation)], assessment [§ 7201 (*payment*)], and collection [§ 7201 (*payment*)] of federal taxes ... through deceit, craft, trickery and dishonest means [larceny, common law; *Haas*; *Caldwell*].
>
> THE LARCENY BY TRICK COMPONENT.
>
> to defraud the United States Department of the Treasury and the Internal Revenue Service (IRS) [§ 371 (defrauding)] ... through deceit, craft, trickery and dishonest means [larceny, common law; *Haas*; *Caldwell*].
>
> THE ADDED MENS REA COMPONENT.
>
> for the purpose of impeding [§ 7212], impairing [*Haas*], defeating [§ 7201; *Haas*], and otherwise

obstructing [§ 7212; *Haas*] the lawful functions of the IRS [§ 7212; *Haas*] in the ascertainment [§ 7201 (valuation)], computation [§ 7201 (valuation)], assessment [§ 7201 (*payment*)], and collection [§ 7201 (*payment*)] of federal taxes. *See also Hammerschmidt.*

Because any version of a Klein conspiracy is a kitchen-sink concoction, the condition precedent for application of the vagueness doctrine, i.e., that it is at least a legislative product, is impossible to satisfy. *See Morales*, 527 U.S. at 55-56.

If substantive due process still exists, then a crime is defined only under the color of the legislative process. *Lanier*, 520 U.S. at 265-66 and nn.5, 6; *Bass*, 404 U.S. at 347-48 (rule of lenity– (1) common language (2) legislatively enacted); *Cruikshank*, 92 U.S. at 556-59 (overbroad indictment; prosecutor to follow, not create, the law; questions of law are for the court, not the prosecutor).

In application, where the Indictment doesn't charge a crime at all, the defect is jurisdictional. *Peter*, 310 F.3d at 712-13. Also, "a district court is without jurisdiction to accept a guilty plea to a 'non-offense.' " *Id.* at 713 (citing *Meacham*, 626 F.2d at 509-10). *See also Menna*, 423 U.S. at 62-63 and n.2 (non-offense due to application of Double Jeopardy; objection not waived by plea). Thus, a guilty plea does not waive the objection that the indictment fails to charge an offense. *Pease*, 240 F.3d at 942-43.

5. Where the executive authority purports to create the "criminal" "statute," is there a violation of separation of powers?

As phrased, this subject matter jurisdiction question was not raised below.

Even during a state of emergency, and even exercising those war powers, the executive is limited by statute. *Youngstown Sheet & Tube.* If the executive may not seize *property* without a statute, how much more may the executive seize *a man* without a statute? Executives have

no authority to define crimes. *Industrial Union*, 448 U.S. at 672-77 (Rehnquist, J., concurring; citing *Field*); *Dennis* (1951), 341 U.S. at 525-26 ("those whose duty it is to legislative," p. 525) (Frankfurter, J., concurring). "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Field*, 143 U.S. at 692; *Schick*, 419 U.S. at 273-76 (Marshall, J., dissenting) (no authority to expand sentence by prohibiting parole).

Further, unless *Erie* applies only to civil matters, there being no such thing as "federal common law," neither is there such thing as a "federal common law" crime. *Cf. Holliday*, 70 U.S. at 415; *Bailey*, 444 U.S. at 406; *Turner Dennis*, 271 U.S. at 263 (demurrage distinguished from "penal law"); *OPP Cotton Mills*, 312 U.S. at 145 (essential legislative function includes formulation of policy and rule of conduct, distinguished from fact-finding as delegated to executive agencies). Where "fixing the rate of taxation is a legislative function," *Michigan Cent. R.R.*, 201 U.S. at 293-98, is not criminalizing the non-payment of that tax also legislative?

> We enter perilous territory because, as stated in [*Gradwell*, 243 U.S. at 485] there is no common law offense against the United States; "the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." [*Hudson*, 11 U.S. (7 Cranch) at 34.] If a person is to be convicted of a crime, the offense must be clearly and plainly embraced within the statute. As stated by Chief Justice Marshall in [*Wiltberger*, 18 U.S. (5 Wheat.) at 105], "probability is not a guide which a court, in construing a penal statute, can safely take." It is one thing to allow wide and generous scope to the express and implied powers of Congress; it is distinctly

> another to read into the vague and general language of an act of Congress specifications of crimes. We should ever be mindful that "before a man can be punished, his case must be plainly and unmistakably within the statute." [*Lacher*, 134 U.S. at 628.] That admonition is reëmphasized here by the fact that § 19 imposes not only a fine of $5,000 and ten years in prison but also makes him who is convicted "ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States." It is not enough for us to find in the vague penumbra of a statute some offense about which Congress could have legislated and then to particularize it as a crime because it is highly offensive. Cf. [*James*.] Civil liberties are too dear to permit conviction for crimes which are only implied and which can be spelled out only by adding inference to inference.

Classic, 313 U.S. at 331-32 (Douglas, J., dissenting). In the Klein conspiracy, what's added is statute to statute. "In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions." *Evans*, 333 U.S. at 486 and n.4. The absence of even a mention of executive function speaks volumes, for it doesn't even come to mind to *need* to mention the obvious, i.e., that the executive doesn't define crimes.

For the executive to concoct a tax crime violates separation of powers.

6. Does a non-statutory charge carry any "lesser included's" with it?

See Fleming's Brief, p. 54 (to this effect: if not, there is no charge to analyze).

"Since the provision as to the number of employees was not authorized, the entire definition of which that limitation was a part must fall." *Addison*, 322 U.S. at 618 (civil matter illustrating the principle that if a provision fails, it fails for all purposes).

In every single reported "lesser included" case, the trial court at least starts with a legislative act, and then analyzes for similar elements. *See, e.g., Carter*; *Whalen*, 445 U.S. at 691-93; *Blockburger*, 284 U.S. at 304. But, where the starting place is a kitchen-sink concoction of statutory pieces, picking an actus reus from one provision and the mens rea from an assortment of other provisions, for a court to give it any recognition, acknowledgment, receipt or acceptance, as "evidence of law," is for that court to exceed its statutory authority, which is limited to crimes defined by legislative acts. Points 4, 5, *supra*. No Statute? No "lesser included's."

7. Does Plaintiff-Appellee-Respondent have standing to complain of matters defined, in whole or in part, by 18 U.S.C. § 371?

As phrased, this subject matter jurisdiction question was not raised below. *But see* Fleming's Brief, Point 10; Arnold's Brief, p. 39.

Section 371 clearly addresses property of the "United States." So, from where in the world does the "UNITED STATES OF AMERICA" derive standing? Admittedly, 5 U.S.C. § 101 doesn't exactly say *whose* executive departments. But, Plaintiff is most certainly not a known or disclosed beneficiary! 31 U.S.C. § 321(d). So, where is Plaintiff's injury or damages? *Lujan*, 504 U.S. at 559-62; *Phillips Petroleum*, 472 U.S. at 803-04. Is it a proprietor, per 28 U.S.C. § 3002(15), and if so, does is act commercially, or is it pretending to represent the sovereignty of the "commonwealth?" Still farther, which of the prosecutors, as representatives of the "United States," had signature or other representative (power of attorney) authority on behalf of the plaintiff?

If the UNITED STATES OF AMERICA is an association, and if (a) the United States is a member, and if (b) the matters raised are germane to the purpose, there's still the question of how the known beneficiary subrogates its *criminal* complaint, such that (c) the real party in interest need not participate directly.

Automobile Workers, 477 U.S. at 281-82; *Hunt*, 432 U.S. at 343.

8. Can joinder ever occur with a party that lacks standing?

As phrased, this subject matter jurisdiction question was not raised below. *But see* Fleming's Brief, Point 10; Arnold's Brief, p. 39.

Where there is no standing, there is no case or controversy. *Hunt*; *Lujan*; *Allen*, 468 U.S. at 750-52; *FEC v. Akins*, 524 U.S. at 19-26 (injury in fact; specific statutory provision). No case or controversy means no subject matter jurisdiction, which renders joinder moot.

9. When is joinder "final?"

As phrased, this question and its subparts were not raised below.

See (2 App. Affidavit; 4 App. Affidavits).

Obviously, joinder never starts where there is no subject matter jurisdiction. Points 1-8, *supra*.

A. Where there's a plea, and where threshold and apparent joinder of issue follows from mistake of fact, may that mistake be corrected at allocution?

See Fleming's Brief, Point 15; Arnold's Brief, Point 12. Where mistake of fact negates mens rea for criminal conduct, Arnold's Ex. 2, pp. 53-57, 1 WHARTON § 78, CLARK & MARSHALL § 5.11, as well as meeting of the minds for agreements, 1 WILLISTON § 1:20, at 49-50, and where mistake of fact is a perfectly sound basis for not imposing sentence, it follows that joinder of issue, e.g., capacity, time, place, plane, discharge versus extinguishment, admiralty, etc., is still open for correction as of allocution.

B. If the signing of the "plea agreement" is the (last) time to "object or waive" regarding

joinder, does joinder exist where the "agreement" is (facially) self-breaching?

See Fleming's Brief, Point 7; Question 12, *infra*. The "agreement" contains (1) dismissal of all but Klein conspiracy, and, simultaneously, (2) (A) no facts in support of that "charge," and (B) nothing but purported support for all those dismissed counts. (2 App. "Plea Agmnt").

Based on 9.A., *supra*, it follows that the joinder issues are reopened.

C. Where there's a trial, and where threshold and apparent joinder of issue follows from mistake of fact, may that mistake be corrected as late as allocution, or is joinder irrebuttably resolved at the start of trial?

Based on 9.A., *supra*, where mistake of fact negates the mens rea of the offense, it follows that joinder, as based upon mistake of fact, is also available for correction. Since the final judgment is the "end" of the matter, until that moment, the elements upon which that judgment relies are logically still open for correction.

D. Is disclaimer, arising from asserting the preference for extinguishment as distinct from discharge, a matter of venue or personal jurisdiction, i.e, subject to threshold waiver or estoppel, thus a waste of time to raise thereafter, or of subject matter jurisdiction?

The focus here is the matter in the court. Where the party disclaims the "benefit" of dischargement, and asserts extinguishment, even as late as allocution, may he be bound to dischargement? The so-called "14th Amendment" suggests Yes (i.e., waste of time); *Perry* suggests No (i.e., subject matter jurisdiction).

10. Does an indictment that charges criminally the non-payment of FICA or FUTA seek to reinstate "debtor's prison?"

See Arnold's Brief, Point 3; Fleming's Brief, Points 3, 9, 12 and 19.

Jannuzzio strongly suggests that the answer is Yes.

The subject matter jurisdiction issues in Question 11 were not raised below.

11. Under *Erie* and the proprietorship doctrine, as they pertain to the special maritime and territorial jurisdiction,

A. does federal public trust policy preempt state public trust policy, for purposes of any of 28 U.S.C. § 3002(15)(a), (b) or (c), outside an area that qualifies under 40 U.S.C. §§ 255, 3111 or 3112?

The Indictment alleges "in the Middle District of Florida" (2 App. Indictment 1), among other places. But, if the governor has not signed over the property, then it must still be subject to the judicial (and legislative) authority of the State. Thus, even if the place established by joinder is purportedly in this state, *Erie* suggests that the choice of law in this state are the rules of decision are that of the State in which the federal court sits. To apply *Erie* is to presume diversity, 28 U.S.C. § 1332. Sections 1331 and 1333 may also appear to supply statutory subject matter jurisdiction, as suggested by 18 U.S C. § 7. However, as what type evidence, i.e., evidence of law or evidence of fact, is language relevant to a proprietor's commercial act? Since the law follows the money, and since the money is identified in 31 U.S.C. §§ 5101, 5103, but applies territorially via the UCC, even for purposes of the place alleged and joined, doesn't 18 U.S.C. § 8 apply through the UCC, rather than the other way around? Thus, where a corporation acts in its proprietary capacity within the State's UCC, it follows that the terms of the

obligation from Title 26 are evidence of fact, which raises the question as to how that same language schizophrenically also pretends to be evidence of law. Perhaps CNN and Delta should simply draft *their* own penal codes. While Title 18 arguably could supply evidence of law, there's still the problem with the parties in § 371.

And, while § 1333 may apply generally, which is fine regarding the forum, § 1333(1) takes the matter right straight back to the States via choice of law.

In short, even given joinder on the forum and the place, without affirmative proof of a governor's release of the place described in the Indictment, the choice of law rules favor the state's public trust provisions, for all purposes.

B. if part A is answered in the negative, even where the forum is proper, and even where the benefits exist from both public trusts, and even where something substantial moves in commerce so as to satisfy 18 U.S.C. § 8, doesn't the choice of law analysis still favor the state public trust policy, *especially* for an indictment?

In addition to 11.A., there's 18 U.S.C. § 13. Again, where the parties are allegedly transacting commercially, even if territorially, how does the situs stray from the confines of the judicial district of the State? Not to suggest even remotely that there's an absence of a remedy. Quite the contrary. It's just that of the three parties relevant to the transaction, if one is alleged to satisfy IRC § 7701(a)(6) or (14), and the other 28 U.S.C. § 3002(15)(A), the one remaining to supply a criminal code is the State.

C. even if that state's public policy doesn't apply, doesn't a "taxpayer" have access to the State's original statutory law and common

law via 28 U.S.C. § 1333(1) (saving to suitors)?

Again, the basic question is this: who supplies the penal code? Unless it's the State, then the federal corporation acts as beneficiary, legislator, prosecutor and judge. With one hand, it's a proprietor, and with the other, the "sovereign," all in the same transaction(s). It provides not only the "choice of law" rules, but then the "rules of decision," as well. This may be a superior business model, but as a jurisprudence model, it stinks.[2] To pick up the hat of the proprietor is to put down the hat of the legislator.

In sum, for Question 11, no § 371 (or Title 26) offense applies, even for a "citizen of the United States."

12. Under Federal Rule of Criminal Procedure 11 ("Rule 11"), is a plea properly set aside where the "plea agreement" is (facially) self-breaching?

See Fleming's Brief, Points 6, 7 and 19.

First, there's the problem with the charge, *see McCarthy*, 394 U.S. at 464-67 (unique procedural issue, generally), for where the *court* can't "understand" (recognize, take jurisdiction over) a non-offense, how can a *defendant* "understand" it, either? Secondly, there's the problem with the self-breaching "agreement."

One actual term, *see Benchimol*, 471 U.S. at 455, was that all Counts but the Klein conspiracy were to be dismissed. (2 App. "Plea Agmnt."). If the Klein conspiracy is a crime, at all, then it's a "larceny by trick" actus reus, with an added mens rea of the intent to commit (both forms of) tax evasion and to obstruct the administration of the tax system (just not "corruptly"). *See* Questions 1-4, *supra*. Still, a "larceny by trick with

[2] As proprietor, in conjunction with the financial institutions, in particular, it clandestinely suckers the person into the obligation, and then as "sovereign" it clobbers the person into next week somewhere, taking abusive and unmitigated advantage of the obvious absence of knowledge of the nature of the obligation. No legitimate public trust system even designs a Judas goat process.

the intent to commit embezzlement and non-corrupt obstruction" type of ridiculous concoction would have as active facts something that would establish a "wrongful *acquisition*" of property of the United States (or of an agency thereof). *None* of the facts establishes *any* such "wrongful *acquisition*;" *all* the numerics, etc., purport to establish *nothing but* liability for the DISMISSED Counts; and the judgment imposed sentence based upon that alleged "agreement."

It's inconceivable how an "agreement" could be more blatantly self-breaching than to say, in fact, "All of those are dismissed," *and* "You're being sentenced on all of those, and nothing but all of those, anyway." It follows reasonably that a plea induced by such "agreement" may be fully withdrawn per FED. R. CRIM. P. 11.

13. Under Rule 32(e), is a plea properly set aside where the "plea agreement"

A. charges usurious interest?

See Fleming's Brief, Point 8 (and 12). The "returns," (2 App. "Returns"), not only attempt to induce Fleming into reporting activity of a completely different fiduciary entity, namely the business, as his own, but also at a MARRIED FILING SEPARATELY rate, despite the fact that the prosecutors intentionally dragged Joyce Fleming, his wife, an innocent spouse, *see* Arnold's Brief, pp. 60-61, into the matter as a strategy to dog Fleming. It backfired. Dragging her through this, *and* commingling the business activity into the personal, *and then* charging Fleming, on the commingled numerics, at the MARRIED FILING SEPARATELY rate, constituted usury. The effective rate for 1996 is so high (greater than 25%) that forfeiture of principal follows. The total usury damages exceed $65,000.

B. seeks to reinstate "debtor's prison?"

See Question 10, *supra*.

C. charges *defrauding* but establishes not one penny's worth of property "wrongfully *acquired*?"

See (2 App. Indictment; 2 App. Judgment, 4 App. Judgment; 4 App. Dollar Study). Not one penny's worth of restitution is ordered. Not one penny's worth of "wrongfully *acquired*" property is alleged or proved.

D. seeks to impose sentence upon (*multiple*) allegedly *dismissed* counts?

See Question 12, *supra*, 18, *infra*. *See also* Fleming's Brief, Point 19.

E. if there is a lesser included offense in Count One, at all,

1. confirms, by its own terms, the wholesale and perpetual onslaught of fiduciary abuse?

See Fleming's Brief, Point 12. Per the "clean hands doctrine," no beneficiary can benefit from its (intentional) wrongful conduct. *See R. H. Stearns*, 291 U.S. at 61-62; *Precision Instrument*, 324 U.S. at 814-15. Between usury, "debtor's prison," deliberate and false bolstering of the numerics, wholly unfounded *defrauding* charge, sentencing on DISMISSED charges, among other problems, the plaintiff has pursued nothing but wholesale fiduciary abuse (under color of law, etc.).

2. asserts a claim sounding in trust, but fails even to allege, much less prove, any beneficiary?

Where is Plaintiff listed in 31 U.S.C. § 321(d)? Where is this plaintiff found *anywhere* in the Code of Laws of the United States? And, where the Department of the Treasury may be an "agency thereof" with respect to the "United States," it's obviously not the party with capacity to sue or be sued, making it not the real party in interest.

See Arnold's Brief, pp. 38-39. And, while the prosecutors purport to represent the named beneficiary, *that* party is *not* the plaintiff. So, where's the plaintiff's interest in the matter? It's certainly not of Record.

3. attributes to an individual "gross income" that is not any individual's, but rather is that of an unindicted entity?

See Fleming's Brief, Point 13. *If* all the entities are shams, nominees or sole proprietorships, then why in the world are separate fiduciary reports even *expected* for corporate, trust or partnership[3] income? *See* (2 App. Indictment 11 (¶ C.14)). Since Plaintiff *expects* such forms submitted, Plaintiff attributes "gross income" to *each* entity, thus *confessing* the *recognition* of each entity as a *separate* fiduciary. Yet, all "gross income" is simultaneously *FLEMING's?!* The unknown beneficiary is horribly confused.

4. holds as liable an alleged "responsible party" where no threshold liability in any entity is even alleged, much less proved?

See Fleming's Brief, Point 14. Liability for "income" from a trust comes in one of two ways: as the fiduciary, thus, as a "responsible party," or as the beneficiary. *Cf.* IRC § 641(b) *with* §§ 652(a), 662(a), 667(a). Where the trust is independent and has its own obligations, and where the trust doesn't fulfill those obligations, then a "responsible party" may be charged with the "100% penalty," which simply transfers the entity's obligation to the "responsible party." IRC § 6672. Thus, it's *not* the entity's *"income"* that is attributed the "responsible party," but rather the entity's *"tax liability."* In Arnold's trial, Plaintiff cannot have made a bigger deal out of characterizing Fleming as a "responsible party." But, there's not one penny's worth of "tax liability" for *any*

[3] Fleming was neither a general nor a limited partner in any entity involved.

entity, *any*where alleged, much less proved. *See* (2 App. Indictment; 4 App. Entity Chart).

To illustrate this another way, the "responsible party" is not a *conspirator*, but a *principal*. Such case is not defined around Fleming, but around the/an *entity*. Thus, that case certainly isn't defined by § 371 (defrauding), or even by *§ 371* (United States law), IRC § 7201 (valuation), § 641, § 6672 (Fleming), but rather by *§ 2*, § 7201 (valuation), § 641, § 6672 (Fleming), a charge found nowhere in the 19 Count Indictment.[4]

To complete the picture, by confusing the legal and accounting theories beyond all recognition, Plaintiff, rather than attribute the entity's "tax liability" to Fleming, attributed the entity's "income" to Fleming. While Arnold's trial Record may provide ample basis for concluding a "responsible party" attribution to Fleming, it is still the case that in addition to the fact that *this* charge was never even alleged, there's also not one iota of evidence that identifies Fleming as a beneficiary. And, while terminating trusts is certainly possible, BOGERT §§ 991-1010, rewriting them is not something accomplished unilaterally by one (unknown) beneficiary. Where statute even allows modification, *all* beneficiaries have to agree to it. BOGERT § 992 at 229. There is no evidence of any such unanimous consent. "One beneficiary cannot affect the interests of another beneficiary by his consent or ratification with regard to a change in the trust." *Id.* at 227.

A "responsible party" is liable for the entity's "tax," *not* it's "income." There exists not one allegation, matched completely by there being not one shred of evidence, of "tax liability" for any entity involved.

5. fails to establish any "tax deficiency" in any individual?

See Fleming's Brief, pp. 8-9, and Point 13. Since Fleming never consented to the numerics fabricated

[4] The exact same issue arises for Arnold. *See* Arnold's Brief, p. 49.

against him, (2 App. "Returns"), as demonstrated by his never signing those "for information only" "returns," and since none of that "income" is Fleming's, or any other individual's, there is still no evidence of any "tax deficiency" attributed to him, or to anyone else.

6. fails to establish any set of convictions to satisfy the term "corruptly?"

See Arnold's Brief, pp. 31-32; (2 App. Indictment, Judgment). The "judgment" reads "impeding or obstructing." This comes *not* from § 371 (defraud), but rather from § 7212 (omnibus) ("§ 7212") ("obstructs or impedes"). *See* Question 4, *supra*. But, not *all* of § 7212 is invited to play Klein conspiracy. Carefully written *out* of § 7212 is the key term that saves § 7212 from duplicity, namely "corruptly." *See* Question 5, *supra*. Practically speaking, do not *all* violations of the IRC, civil and criminal, "obstruct or impede?" If § 7212 is to be included, then it is to be included as a whole (e.g., via Fed. R. Evid. 106). "Corruptly" can't and doesn't look to mere allegations, but rather to convictions, for how can *any* lawful act *ever* qualify as "corrupt?" Since only "unlawful" acts qualify, and since "unlawful" is determined by conviction, not mere allegation, where there is but one (non-violent) "charge," it's legally impossible to satisfy "corruptly," because one (non-violent) charge, in and of itself, even if proved, *is not "corrupt."*

"Impeding or obstructing" necessarily exists also, and only, with "corruptly," yet "corruptly" was never alleged. Further, since "corruptly" is legally impossible to prove where there is only one (non-violent) charge, there can be no "impeding or obstructing" in this, or any, one (non-violent) count case.

7. asserts and confirms a position so inconsistent with the presumed role as to amount to disclaimer?

See Fleming's Brief, Point 14. "The remedies are by way of enforcement and not extinction of the trust." BOGERT § 861, at 28. To annihilate the business entity fiduciary, and to commingle all of its financial activities with some other obligation, is to disclaim recognition and acknowledgment of the fiduciary and to disclaim receipt and acceptance of the benefit. This manifestly inconsistent conduct by the horribly confused beneficiary triggered disclaimer instantly. *See* BOGERT §§ 170-72 (disclaimer and its effect) (in particular at 205-07). Since beneficiary status starts from the date of creation of the trust, disclaimer operates *nunc pro tunc* to that same date. BOGERT § 172, at 227-28.

F. arises from the same mistake of fact resulting from ignorance of the law that applies to the case, generally?

See Fleming's Brief, Point 15, generally, and p. 46, in particular. *See also* 1 WILLISTON § 1:20, at 49-50 (mistake is sound basis for rescinding or refusing to perform a contract). Never mind mistakes as to time and place. Fundamental here is the mistake regarding the legal impossibility of "wrongful *acquisition*" of property of the United States (or any agency thereof). Such conduct just flat never happened, and the complete absence in the Record of both allegation and proof of any such "wrongful *acquisition*" abundantly supports the conclusion.

14. Can the advisory panel's opinion be sustained where there is no evidence of

A. defrauding (wrongful *acquisition*)?

See Questions 1, 2, 12.C. and 13.F. *See also* Arnold's Brief, Points 5-6. Where there is no evidence of an element of the "charge," here, "wrongful *acquisition*," the panel's opinion cannot be sustained. *Morissette*; *Neder*, 527 U.S. at 15-20 (instruction); *Holland*, 348 U.S. at 125, 129 (evidence); *Christoffel*, 338 U.S. at 89-90 (evidence);

Moore, 429 U.S. at 22 (evidence); *In re Winship*, 397 U.S. at 364 (evidence).

B. "tax deficiency"

1. in any business entity?

2. in any individual?

See Question 13.E.5, *supra*, and Arnold's Brief, Point 4, in particular pp. 28-30. Applying 14.A., and viewing § 7201 as a "lesser included," where's the "tax deficiency?"[5] There is none proved for any entity, and the "income" is not any individual's. Therefore, if § 7201 *is* part of Count One, then a key element in the "charge" is completely absent. (2 App. Instructions).

15. Can the advisory panel's opinion be sustained where the definition of *defraud* in the charge is not the proper definition?

See Questions 1, 2 and 14, *supra*; Arnold's Brief, Points 5-7. Where the definition of *defraud* is errant, the elements of the offense are not presented, meaning that the prosecution gets a "bye" on the element(s), rather than scrutiny to the level of beyond a reasonable doubt. From one view, the errant law or definition invades the province of the jury, for the fact-finder cannot determine facts it doesn't know to determine. From another view, such error fails to satisfy the proper determination of the law, which is the province of the court.

16. Does the "judgment" that orders no restitution confess, judicially, the complete absence of any *defrauding*?

See (2 App. Judgment; 4 App. Judgment); Arnold's Brief, Points 8-9. Regarding terms and conditions for probation, per 18 U.S.C. § 3563(a), restitution is mandatory; per § 3563(b), discretionary. Per

[5] Petitioners prefer "(underpaid) '(net) tax imposed.' " It tracks § 7201; *all* § 7201 matters involve an underpayment; and this phrasing looks to *valuation* and *payment* to identify which level of proof is at issue. *See* Arnold's Brief, pp. 28-30.

§ 3663A(a)(1), restitution is mandatory at the time of conviction if the offense is described in § 3663A(c), which subsection includes, in (c)(1)(A)(ii), "an offense against property under this title, ... including any offense committed by fraud or deceit." Section § 3663A specifically applies both to plea agreements and convictions. Both "judgments" include probation time after incarceration. Neither "judgment" orders restitution. Therefore, the only logical conclusion is that there was no *defrauding*, as judicially confessed by the "judgments," themselves.

17. Where there is no § 7201 (*payment*) case (for there is no assessment), is there any authority for any payment mandamus?

Authority. *See* Arnold's Brief, pp. 28-30 and Point 10; Fleming's Brief, Point 18; (2 App. Judgment 4; 4 App. Judgment 4). Where the only "charge" is a Klein conspiracy, the only "payment" issue is restitution. Thus, the mere existence of a payment mandamus boldly announces sentencing based upon what is actually a non-existent count, or else a "lesser included" offense within Klein.

In *England*, the validity of the assessment mattered greatly, because the charge was § 7201 (*payment*). *England*, 347 F.2d at 429-31. Here, not one penny's worth of liability is affirmatively pled or proved, meaning that there is no assessment, meaning that this is not a § 7201 (*payment*) case. Yet, both "judgments" mandate payment.

For the trial, where there's an "assessment" introduced at sentencing, rather than at trial, Arnold has been totally and completely deprived of substantive due process. There's no notice of any § 7201 (*payment*) case, anywhere in the 19 Count Indictment. Morever, his right to cross-examine has been abrogated. Regarding the absence of evidence, there was no more a valid unit of account then than there is now, and it's impossible for there to be evidence in the Record to the contrary (unless

its perjured, and even *that* doesn't fix *this* problem).

For the "plea agreement," cross-examination isn't really the issue, but validity of the assessment still is, as is substantive due process.

There is no authority for any payment mandamus.

Vagueness. If there's authority for the payment mandamus, that still doesn't fix its vagueness problems. *Whose* "taxes" is Fleming ordered to pay: his, the entity's or those of the "third *res*?" *Which* "taxes:" "income," FICA/FUTA, or both/all? As for Arnold, given that the *entire* matter focuses on what *Fleming* did or didn't pay, how in the *world* is *Arnold* now liable to *pay Fleming's* "taxes," of *any* type or variety?! The mere *existence* of a set of numerics for Arnold makes him a principal, not a conspirator. And, where the Indictment proclaims to the world that DONALD C. and JOYCE FLEMING are the financial focus, for Arnold to have a payment mandamus is nothing but additional confession and confirmation that the *entire* matter focused *not* on *Fleming*, *not* on *Arnold*, but on the *entity!* And, that fact means that the parties, the legal theories, the facts, the accounting, *everything*, was errantly conceived and wrongly focused from the threshold. The real target was the unindicted entity, which Plaintiff annihilated, thereby disclaiming all.

In sum, the mandamus' vagueness, alone, renders it unenforceable. But, the mere existence of *this* payment mandamus against Arnold judicially confesses the entire case for the sick joke it is. Such mandamus, based upon *these* numerics, (A) (very doubtful) creates never before heard of "law" that a conspirator (1) may be ordered to pay another conspirator's "taxes," or (2) may be ordered to pay "taxes" that were *never* part of the case, or (B) (in reality) confesses that from the outset the "income" was the entity's, not any individual's.

18. Where there is a "plea agreement," can a "judgment" stand, where the Counts that form the basis for the "judgment" are the very same

as those agreed to be dismissed?

See Question 12, *supra*. *See also* Fleming's Brief, Point 19; (2 App. Judgment; "Plea Agmnt;" "Returns"). The Klein conspiracy count looks, if to any fact, to a "wrongful *acquisition*." There being none, there is no basis for any sentence based upon such "charge."

The numercis against Fleming include "income tax," FICA and FUTA amounts. But, the only counts for which such numercis could possibly be relevant are the DISMISSED counts. In sum, Fleming was sentenced not for any Klein conspiracy, but rather on all the counts allegedly DISMISSED.

Such "judgment" cannot stand.

19. Where there is a trial, can a "judgment" stand, where the Counts that form the basis for the "judgment" were dismissed and never tried?

See Question 18, *supra*. *See* Arnold's Brief, Point 11; (4 App. Numerics). Again, substantive due process problems scream from the page. The only "charge" tried was Count One, the Klein conspiracy, for which there is no statute, no "wrongful *acquisition*" pled and no "wrongful *acquisition*" proved. Yet, the numerics used against Arnold include (*Fleming's*) "income tax," FICA and FUTA, regarding which counts were DISMISSED even as against Fleming. Also, the numerics used against Arnold, in a case allegedly focused solely on Fleming, are numerics *never* attributed to Fleming! (Thus, Arnold is not a conspirator, but a principal.)

Such "judgment" cannot stand.

20. Can a "judgment" stand, where the indictment charges the party as a conspirator but he is sentenced as a principal?

See Arnold's Brief, Point 11; (4 App. Affidavits). The "crime(s)" for which Arnold is sentenced appear nowhere in the 19 Count Indictment. They were never tried. They simply "appeared" for purposes of sentencing. And, the

"facts" in support of those "charges" lodged for purposes of sentencing were never offered at trial, thus never subject to cross-examination. He was tried as a "conspirator," but sentenced as a principal.

On the one hand, as identified in Question 17, this treatment of Arnold confesses the obvious: the case was about the entity's "income," not any individual's. Thus, as with Fleming, even if Arnold *had* been charged properly, as a principal, as a "responsible party" for the entity, *see* Question 13.E.4, *supra*, there's still not even an allegation, much less proof, of any "tax liability" for any entity.

If the indictment is meaningless, and if trial is a facade, and if evidence at trial is unnecessary, and if cross-examination is irrelevant, and if all that matters is what the prosecution can get into the Record at sentencing, why is there anything but "sentencing hearings?" We obviously don't need grand juries, indictments, trials, evidence, cross-examination or trial juries. We only need pre-sentence reports and "sentencing hearings."

If the previous paragraph is not true, then this "judgment" can't stand.

21. Can either one of two related "judgments" stand, where, between them, they charge "double taxation?"

See (2 App. Numerics, Judgment; 4 App. Numerics, Judgment); Arnold's Affidavit (on appeal); Fleming's Brief, Points 20-21; Arnold's Brief, Points 13-14; Arnold's motions for release pending appeal; joint petition for mandamus.

For 1996, the prosecution levied at least two "taxes" on the "third *rex*." One was in Fleming's honor; another, in Arnold's. Plaintiff attributed 100% of the entity's "income" to Fleming, and then *another 75%* of that same entity's "income," for that same time period, to Arnold. Both Fleming and Arnold are subject to payment mandamus based upon those numerics. *Cf. Kurth Ranch*,

511 U.S. at.778-84 (punitive tax).

Not only is this fraud on the court, but also it's "double taxation" of the "third *res*," which was created by commingling the entity's (or really, various entities') activities into one pile of numerics for purposes of the litigation.

Plaintiff cleverly kept the information clandestine enough that neither Fleming nor Arnold knew of the "double dipping" until after both had been "sentenced;" hence Arnold's raising of the matter in the appellate Record.

Another subject matter jurisdiction issue, and a legality issue, not specifically articulated as such below, is that where Plaintiff, via this "double taxation" scam, actually sought a *de facto* forfeiture via an exorbitant "tax" rate, *and* for there also to be a loss of liberty sentence, there raises another type of double jeopardy. *See Kurth Ranch*; *Austin*.

22. Can either one of two related "judgments" stand, where, between them, they create "simultaneous double jeopardy?"

See (2 App. Numerics, Judgment; 4 App. Numerics, Judgment); Arnold's Affidavit (on appeal); Fleming's Brief, Points 22-23; Arnold's Brief, Points 15-16; Arnold's motions for release pending appeal; joint petition for mandamus.

Double jeopardy vitiates the second sentence, when a distinction between first and second is possible. Here, the double jeopardy issue occurs simultaneously, necessitating the vitiation of both judgments.

For 1996, by sentencing both Fleming and Arnold, on the same count in the same indictment, as agents for the same entity, over the same "business income," the actual owners of that entity are twice at risk of loss of property for the same offense, not only for Plaintiff's commingling, but also for the "double taxation," one "tax" in honor of each alleged agent. This sort of problem is avoided at the threshold by having a clue as to which party is the real

party in interest. Here's, it's a business entity, not any individual.

Conclusion.

Wrong legal theory (larceny is not embezzlement); wrong parties (both plaintiff and defendant); no statute (Klein is non-statutory); no facts (pled or proved regarding *any* "wrongful *acquisition*" or "tax deficiency" in any entity or individual); incompetent definition of *defraud*; mandamus for non-alleged *payment* case; sentenced on DISMISSED counts; charged as conspirators, sentenced as principals; "double taxation" (via fraud on the court); and simultaneous double jeopardy.

Remedies on Certiorari.

1. Petitioners request that this Court issue the writ of certiorari and take jurisdiction of this matter.

2. Petitioners request release pending appeal.

3. Petitioners request reversal of the "judgments" entered by the trial court.

Related Remedies.

4. Where the Court may identify additional issues that should be briefed for this matter, leave to file such supplemental brief is requested.

5. Per Rule 14.5, if there are any formatting matters that may be remedied via an amended filing, then leave for such amendment is requested.

6. If there are additional matters properly included in any Appendix, leave to amend or supplement the Appendix is requested.

7. Where there is an objection to service regarding this proceeding, time is requested to make proper service.

8. To expedite all matters, no oral argument is requested.

9. Tax costs to Respondent, thus reimburse Petitioners for costs and out of pocket expenses for this proceeding.

10. Petitioners request any and all other relief in equity to which Petitioners may show themselves justly entitled.

Respectfully submitted,

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